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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-978

L. JOSEPH OVERTON,

Petitioner,

against

UNITED STATES OF AMERICA,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM, 1972

No. ————

L. JOSEPH OVERTON,

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Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, L. Joseph Overton, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 12, 1972.

Opinion Below

The opinion of the Court of Appeals not yet reported, appears in the Appendix hereto. No opinion was rendered in the District Court for the Southern District of New York.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on December 12, 1972. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is involved under 28 U.S.C. § 1254(1).

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Questions Presented

1. Whether a prosecutor, once having consented to a defendant's waiver of jury trial under Rule 23(a), F.R.Cr.P., should be allowed to withdraw same in the absence of a showing of good cause.

2. Whether the trial court's erroneous addition of an additional alternate juror after jeopardy attached placed the petitioner in the constitutionally impermissible position of having to forego his right to participate in the further jury selection in order to preserve his potential double jeopardy claim.

Statutory Provisions Involved

United States Code, Title 28:

> Rule 23(a) Federal Rules of Criminal Procedure. Trial by jury.
>
> Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

Statement of the Case

In 1970, the petitioner and four others were indicted in the United States District Court for the Southern District of New York for conspiracy to violate 29 U.S.C. 186. That section generally prohibits employers of employees in an industry affecting commerce from giving money or other things of value to union representatives of said employees, and prohibits the same union representatives from receiving money or other things of value from the employers. He was also charged with nine substantive counts of receiving certain payments of money in violation of that same section.

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I.

During the pre-trial conference in this case held on November 5, 1971, counsel for all the defendants announced to the district judge to whom the case had been assigned, that their clients had decided to waive a jury.* The Assistant U.S. Attorney in charge of the case then indicated that "the government is prepared to accept a waiver." Relying upon the government's representation, the trial judge then agreed to set the case down for a trial to begin five days later on November 10.

On November 10, the parties again appeared before the trial judge. At that time, the Assistant U.S. Attorney announced to the court that

> "the government has re-examined its position and we feel that because of the nature and the background of this case that it would be better for everyone involved to have the issue of guilt or innocence decided by a jury. Accordingly, pursuant to Rule 23(a) of the Federal Rules of Criminal Procedure, the government declines to consent to the waiver of a jury in this case."

One of the defense counsel, pointing out that the government had reversed its position, stated that "we are entitled to know the exact reason why the government is not consenting. . . . The U.S. Attorney said it is in the interests of all parties. I would like to know what they mean by that. It is certainly not in my client's interest."

The court, however, accepted the government's change of position without allowing any inquiry as to its reasons; and the case went on to be tried with a jury approximately five months later.

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* The entire hearing is set forth in the appendix to Petitioner's brief in the Court of Appeals.

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II.

The trial commenced in April of 1972. On April 6, twelve jurors and two alternates (the total numbers designated by the trial court) were empaneled and sworn. The following day, juror number eight, a mother with a young child asked to be excused, because the babysitter she had arranged to have was unable to continue to take care of the child. With both sides consenting, the court excused the juror, replacing her with alternate juror number one (TR 46-49). The court, however, then went on to announce that it was going to impanel another alternate, thus bringing the number of alternates up to the original number of two. Six new prospective jurors were then summoned from the central jury panel, and the government and the defendants were each given "three additional challenges for the entire jury of twelve jurors" (TR 52).

The defense objected to the entire procedure, claiming that the court could not add additional alternate jurors after the jury and agreed-upon number of alternates had been impaneled and sworn, and specifically refusing to exercise any of the three new challenges offered by the court, or to otherwise engage in the selection process of the second alternate juror.

The case thereafter proceeded to verdict, with the last-selected alternate being excused prior to the commencement of the jury's deliberation.

Reasons for Granting the Writ

1. The case raises the significant question as to whether Rule 23(a), F.R.Cr.P. imposes a good faith requirement in connection with a U.S. Attorney's refusal to consent to a defendant's attempted jury waiver.

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Rule 23(a), F.R.Cr.P. provides that a defendant may waive his constitutional right to a trial by jury "with the approval of the court and the consent of the government."

In *Singer* v. *United States,* 380 U.S. 24 (1965), this Court upheld the requirement of the prosecutor's consent in the face of a claim that a defendant's right to waive a jury was unconditional. This case presents the related but quite different question as to what limits or restrictions, if any, should be placed upon the prosecutor's exercise of his veto. Petitioner suggests that as a matter of due process and fundamental fairness, the prosecutor's right to veto a defendant's attempt to waive a jury trial be subject to a requirement of good faith; and that this case presents an appropriate opportunity to lay down such a rule.*

In this case, the government, on November 5, 1971 first clearly and unequivocally announced its consent to a non-jury trial. Then, on the date set for the formal execution of the waiver and consents and the commencement of the trial, the government prosecutor announced that the government had "re-examined its position, and that it would be better for everyone involved to have the issue of guilt or innocence decided by a jury."

The defense took issue with the prosecutor's statement, with one of the defense attorneys specifically stating that a jury trial clearly was *not* in his client's interests. And the defense repeatedly sought, without success, to have the trial court require the prosecutor to give his reasons for his refusal.

Petitioner suggests that the prosecutor's refusal be subject to a good faith test: as, for example, is the defendant's

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* Petitioner does not contend that this is one of those rare cases in which a defendant should be able to waive a jury even in the absence of a consent by the government See *U.S* v. *Daniels,* 282 F.Supp.360 (N.D.Ill. 1968).

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waiver under New York law.* Although bad faith could not be established because the trial court refused to conduct an inquiry into the government's unusual change of position, both the defendants and the public were harmed by the government's action.

The defendants were harmed by being unable to insulate the fact-finding process from the detrimental effects of substantial unfavorable pre-trial publicity—which was no doubt one of the principal motivating factors behind the defendants' original decision.

The public was harmed in two ways. First, by a five month delay in the commencement of the trial: and second, by the trial taking almost three weeks, as contrasted with the five to six days it would have taken if tried without a jury.

Faced as our court systems are today with unreasonably long delays in the prosecution of criminal cases, the trial of cases without a jury should be encouraged wherever possible. One constructive way would be to eliminate the requirement of the government's consent (the law in New York). Short of that, there should be a requirement that the government's withholding of its consent be exercised in good faith.

2. The case also raises the interesting question as to whether a trial court's decision to add additional alternates after jeopardy has attached places the defendant in the constitutionally impossible situation of having to choose between participating in the further jury selection or preserving his Fifth Amendment double jeopardy claim.

The action of a trial court in putting a defendant in a position where he is forced to waive one constitutionally

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* New York Criminal Procedure Law § 320.10(2) which empowers the trial court to reject the waiver if it determines that it is rendered as a stratagem to procure an otherwise impermissible procedural advantage.

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guaranteed right in order to assert another should be the subject of grave concern to this Court. This is exactly what happened in this case in the court below.

The defendants in this case were placed "in jeopardy" as of the empaneling of the twelve jurors and two alternates on April 7. *Downum* v. *United States,* 372 U.S. 734 (1963); *United States* v. *Jorn,* 400 U.S. 470 (1971). In the absence of "imperious necessity," they had the right to have their trial "completed by the particular tribunal summoned to sit in judgment on (them)." *Downum, supra,* at 37-2 U.S. 736. In that connection, they had the right under the Fifth Amendment double jeopardy clause to insist that any verdict in the case be rendered by the original twelve jurors—with, however, the possibility that up to two of the original twelve jurors could, for good cause, be replaced by an alternate. *Robinson* v. *United States,* 144 F. 2d 392, 397 (6th Cir. 1944), aff'd on other grounds, 324 U.S. 282.

When the trial court ordered the selection of an additional alternate juror after jeopardy had attached, it acted erroneously. *Horne* v. *United States,* 264 F. 2d 40 (5th cir. 1959), cert. denied 360 U.S. 934; see also 3 Orfield, Criminal Procedure under the Federal Rules Section 24:101.

In *Horne,* the appellant had been convicted by a verdict of a jury comprised of only eleven members, the twelfth juror having been excused by the court during the course of the trial. On appeal, the appellant contended that the court erred in permitting such a verdict and in not having provided for alternate jurors. The Fifth Circuit affirmed, pointing out that appellant had expressly consented to both a verdict of eleven and dispensing with any alternates.

The court went on to point out that "the only time that provision could be made for alternates was at the com-

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mencement at trial. *Thereatfer, no matter how compelling the circumstances, it could not be done.*" 264 F. 2d 40. (emphasis added)

By erroneously directing the addition of another alternate juror after jeopardy had attached, the trial court placed the defendants in an impossible dilemma. They were faced with the Hobson's choice of participating in the further jury selection process and thereby perhaps waiving their future double jeopardy claim (which would occur if the newly selected alternate subsequently replaced one of the original twelve), or preserving their double jeopardy claim by not participating and bypassing further voir dire and challenges to which they were entitled.

The court's error thus forced the defendants below into the untenable position of having to by-pass their rights to examine further prospective jurors in order to fully preserve their rights under the double jeopardy clause.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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January 8, 1973.

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APPENDIX

(Opinion and judgment of the Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 290, 291, 292—September Term, 1972.

(Argued November 2, 1972 Decided December 12, 1972.)

Docket Nos. 72-1730, 72-1767, 72-1768

UNITED STATES OF AMERICA,

Appellee,

—against—

L. JOSEPH OVERTON, LAWRENCE J. OVERTON, and HULAN JACK,

Defendants-Appellants.

Before:

LUMBARD, FEINBERG and OAKES,

Circuit Judges.

Appeal from judgments of conviction entered in the United States District Court for the Southern District of New York, Sylvester J. Ryan, *J.*, after jury trial, for conspiring to violate 29 U.S.C. § 186, and, as to two appellants, for substantive violations of that section.

Affirmed.

FREDERICK P. HAFETZ, New York, N.Y. (Moses L. Kove, on the brief), *for Appellants Lawrence J. Overton and Hulan E. Jack.*

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Appendix.

SAMUEL A. NEUBURGER, New York, N.Y. (Nathan H. Mitchell, on the brief), *for Appellant L. Joseph Overton.*

EDWARD J. KURIANSKY, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York; William D. Gray and John W. Nields, Jr., Assistant United States Attorneys, on the brief), *for Appellee.*

FEINBERG, *Circuit Judge:*

These appeals involve a scheme alleged to violate 29 U.S.C. § 186, an enactment intended to safeguard the integrity of the collective bargaining process. Appellants L. Joseph Overton, his brother Lawrence J. Overton, and Hulan Jack were convicted after a two and one-half week jury trial in the United States District Court for the Southern District of New York, Sylvester J. Ryan, *J.*, of conspiracy to violate section 186. 18 U.S.C. § 371. L. Joseph Overton was also convicted on nine counts which charged receipt of certain payments of money in violation of that section; Hulan Jack was also convicted on nine counts which charged the aiding and abetting of substantive violations by the making of those payments. 18 U.S.C. § 2. On June 6, 1972, Judge Ryan sentenced L. Joseph Overton to a term of imprisonment for one year, six months to be served, six months suspended, followed by probation for three years; the judge also imposed a $10,000 fine. Hulan Jack was sentenced to three months in prison, with the balance of a one-year term suspended, and was

fined $5,000.[1] Lawrence J. Overton was given a one-year suspended sentence and a $10,000 fine. Appellants individually and together raise a number of contentions on appeal. We find none of them persuasive, and affirm the judgments of conviction.

I

The Government's evidence—which, where controverted, could be and apparently was believed by the jury—showed the following. The conspiracy, which ran from 1966 to late 1970, centered around the union influence of L. Joseph Overton, Business Agent for Harlem of Local 338, Retail, Wholesale Chain Store Food Employees Union, AFL-CIO ("Local 338"). Co-conspirator, Lawrence Overton, brother of Joseph, was likewise active in the union, and during the period in question served periodically on its Welfare Board and on its Executive Board. Both men also played considerable roles in the formation and operation of Coordinated Community Services, Inc. ("CCS"), a principal tool of the conspiracy.

CCS was a private stock corporation formed in early 1966. The four original shareholders—each with 25 per cent of the stock—were Joseph Overton, Hulan Jack, Theodore Solomon, and Harry Rosenblum. Solomon was executive secretary of Associated Grocers of Harlem, Inc. ("AGH"), which represented 70 Harlem grocery stores and supermarkets and which negotiated and signed labor contracts with Joseph Overton and Local 338. Rosenblum was the owner of two grocery stores which were members of AGH and which adhered to the AGH-Local 338 labor

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[1] These sentences were imposed on Count 1, the conspiracy count. On the remaining counts these appellants received identical sentences of one year suspended and three years probation, to run concurrently with sentences imposed on the conspiracy conviction.

contracts.[2] Shortly after organization of CCS, Joseph Overton purported to transfer his interest in CCS to another corporation, Emancipation March, Ltd., principally controlled by his brother Lawrence. The jury could find, however, as the Government urged, that this was merely an attempt at concealment and that Joseph Overton at all times remained a real CCS shareholder in interest. Once organized, CCS entered into contracts with six large and well-known food manufacturers. In return for fees from them which totalled as much as $80,000 per annum, CCS undertook to promote their products among the grocers and larger food retailers of Harlem. Promotional efforts were principally visits from Lawrence Overton, salaried as "Director of Operations" for CCS, and from his assistant in this capacity, Leonard Faust, brother-in-law of Joseph Overton.[3] Evidence disclosed that Joseph Overton intervened directly with a retailer on at least one occasion; so, too, did Hulan Jack. Jack, Faust, and Lawrence Overton were all known in the Harlem community, and their personal relationship and business affiliation with Joseph Overton were known generally by retailers with whom they dealt.

The parties disagree as to how properly to characterize the corporate purpose of CCS. Appellant Jack testified that CCS operated simply as a public relations consultant, striving to improve the image of the products of its clients in the black community in Harlem. The Government, on the other hand, argues that the primary, if not sole, corporate purpose was to exploit the enormous union power

[2] Solomon and Rosenblum were convicted on the conspiracy count and on various counts charging substantive violations. Sentences of one year imprisonment, imposed upon each, were suspended. Rosenblum was fined $5,000; Solomon, $2,500. They do not appeal.

[3] Faust was indicted and tried as a co-conspirator. The jury was unable to agree on his guilt, and a mistrial was declared.

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of Joseph Overton to the pecuniary benefit of the corporate principals. Doubtless, the jury accepted the latter view. It is precisely this exploitation which the framers of section 186 viewed as inimical to constructive labor-management relations. Food retailers who employed union labor or employees who might seek representation by Local 338 could reasonably anticipate labor difficulties were they unwilling to purchase products of CCS clients. Once having agreed to patronize manufacturers represented by the Overtons through CCS, these retailers would probably expect fewer problems with the union. See *United States* v. *Ryan*, 225 F.2d 417, 226 (2d Cir. 1955) (L. Hand, *J.*, dissenting), rev'd, 350 U.S. 299 (1956) ("Congress wished to prevent employers from tampering with the loyalty of union officials and disloyal union officials from levying tribute upon employers.") In short, the desire to make profits for CCS threatened to become the exclusive determinant of the adequacy with which employee interests were represented. That CCS offered a vehicle for subverting congressional purpose is thus clear. Whether the Government proved that appellants' conduct fell within the technical proscriptions of the statute, as charged in the indictment, is the principal question before us.

II

Appellants argue that the Government's evidence was insufficient to prove elements of the conspiracy as alleged in the first count of the indictment. Section 186(b) of Title 29 makes it unlawful for any person to

> request, demand, receive, or accept, or agree to receive or accept, any payment, loan or delivery of any money or other thing of value prohibited by subsection (a) . . . .

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Section 186(a) in turn prohibits the payment or delivery, by an employer or person acting "in the interest of an employer," of "any money or other thing of value"—

> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or (2) to any labor organization, or any officer or employee thereof, which represents, *seeks to represent, or would admit to membership,* any of the employees of such employer . . . . [Emphasis added.]

Appellants concede that there was sufficient evidence of a violation of sections 186(b) and (a)(2); they admit that grocer-employers of clerks who *could be* represented by Local 338 were solicited for a "thing of value"—i.e., purchase of the products of clients represented by CCS. But, they contend, such a violation was not charged since the indictment specified only requests to and solicitations of employers whose employees were *already* members of the union, and thus only charged a conspiracy to violate 186(b) and (a)(1); because the Government proof did not establish requests to or demands of employers actually—as opposed to potentially—employing members of Local 338, there was no proof whatsoever of the crime charged.

To this, the United States makes a two-fold reply: Appellants have simply misread the indictment; and even under their erroneously narrow reading, there was sufficient evidence to prove the charge. The second argument is clearly correct. It must be remembered that the crime alleged was conspiracy—an unlawful agreement to solicit contracts from grocer-employers of members of the local. Even if no actual solicitation of grocer-employers was established, proof of an agreement to solicit would alone suffice. Here the Government introduced a CCS memorandum for a client which outlined specific programs designed

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to solidify CCS good will among store clerks: These included "special nights honoring members of the retail union" and occasions on which CCS would host "membership meetings of the union, serving the products of our sponsor." A letter to a second client stated that:

> A sustained campaign is waged by CCS to increase the demand . . . by soliciting the cooperation of the stores . . . on behalf of the products we sponsor. In addition, CCS has a good working relationship with the clerks.

We think this language, taken in context, is adequate to warrant the inference that the clerks and union members referred to were employees of the grocers solicited. The further inference—that solicitation of grocers actually employing Local 338 members was a primary purpose of the conspiracy—seems also justified.

On this view, it is unnecessary to deal at length with appellants' claim that the indictment did not also charge a conspiracy to violate subsection (a)(2) of section 186. We conclude that it did, as set forth in a footnote below.[4]

III

Appellants Joseph Overton and Jack assert that the legal theory under which the various substantive violations went to the jury was erroneous as a matter of law and mis-

[4] Appellants argue that paragraph 2 of Count One, which refers in terms only to section 186(a)(1), is the sole definition of the conspiracy grounded squarely on the language of the statute. They regard paragraph 3, which tracks the language of 186(a)(2), as mere amplification of Joseph Overton's role in the conspiracy. A fair reading of the first count, however, reveals that paragraphs 2 and 3, following generalized allegations of conspiracy in paragraph 1, together point up the dual objective of the conspirators, and both serve to link the conspiracy to the two statutory subsections equally implicated. Just as clearly, Joseph Overton's role is more fully set out, not in paragraph 3 at all, but in paragraph 4.

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interprets the purpose of the statute. This theory—wholly different from the one which supported the conspiracy count—assumes that payments in the form of CCS checks, signed by defendant Rosenblum and Solomon (aided and abetted by appellant Jack), made to appellant Joseph Overton gave rise to criminal liability under the prohibition of section 186. Appellant Jack's violations were in aiding and abetting these payments; appellant Joseph Overton's were in receiving them. In two somewhat related ways, appellants argue that these payments did not violate 29 U.S.C. § 186.

Appellants claim that the payments by Rosenblum and Solomon, who were concededly employers of grocery clerks, were made not on their own behalf, but for their corporation, Coordinated Community Services, Inc.; that CCS was not itself an employer as required by section 186; and that although the jury could properly convict if it found that CCS was acting "in the interest" of employers Rosenblum and Solomon when the payments were made, this theory was never submitted to the jury. The argument is without merit. The jury was adequately charged that it had to find that Rosenblum and Solomon were employers, that on specified dates of payments to Joseph Overton, Rosenblum and Solomon were employers or acting in the interest of employers, and that the checks were made and delivered by Rosenblum and Solomon and received by Joseph Overton. This was sufficient. Payments by these employers, though made through a non-employer corporate instrumentality, are nevertheless within the prohibition of the statute. Cf. *United States* v. *Ferrara*, 458 F.2d 868 (2d Cir. 1972), and *United States* v. *Iozzi*, 420 F.2d 512 (4th Cir. 1970), cert. denied, 402 U.S. 943 (1971), affirming convictions for payments made to labor representatives by a non-employer business entity where a principal thereof owned or controlled or was a key officer of another corporation which

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was an employer. The Supreme Court has characterized section 186 as "a criminal provision . . . which outlaws *all* payments with stated exceptions [not here relevant] between employer and representative." *United States* v. *Ryan*, 350 U.S. 299, 305 (1956) (emphasis added). We see no reason why in this case the corporate scheme devised by these defendants insulated them from criminal liability.

Similar reasoning leads us to reject a parallel contention that because the payments in question were merely internal distributions of profits, they cannot serve as a predicate for conviction. Appellants rely on dictum to this effect in *United States* v. *Lippi*, 190 F. Supp. 604 (D. Del. 1961). Whatever may be the persuasiveness of the reasoning in *Lippi*, which appears to ignore the literal language of the statute, we find that decision inapposite to the facts here. *Lippi* involved a dividend distribution by an operating coal company to its shareholders, one of whom was an officer of the United Mine Workers Local representing the company's employees. Though the CCS payments to Overton can also be labelled "dividends," they stand on rather different footing. Unlike *Lippi*, a union official here became a shareholder of the corporation whose very purpose, the jury could find, was to exploit his own union power.

IV

Appellants contend that the trial judge deprived them of a fair trial when he admitted testimony concerning a labor dispute fomented by Joseph Overton with the Harlem River Consumers Cooperative for the purpose of coercing it to buy products promoted by CCS. Interference with interstate commerce by threats or violence is a felony, punishable by imprisonment for up to 20 years, under a separate provision of the United States Code, 18 U.S.C. § 1951 (the Hobbs Act). Appellants argue that this evidence was

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irrelevant to the lesser crime here charged, was beyond the scope of the indictment, and was unduly prejudicial. We find these arguments unpersuasive.

Evidence of coercive behavior, punishable under the Hobbs Act, is competent and relevant to prove a conspiracy to violate section 186, which contemplates a "situation where an employee representative might resort to pressure to obtain payment by conduct that may be characterized as coercive." *United States* v. *Kramer*, 355 F.2d 891, 896 (7th Cir.), cert. denied, 384 U.S. 100 (1966);[5] see *Arroyo* v. *United States*, 359 U.S. 419, 425-26 (1959); cf. *United States* v. *Ryan*, 232 F.2d 481, 483 (2d Cir. 1956). Joseph Overton's threats against the "Harlem Co-op" were part and parcel of the conspiracy to request and demand things of value from employers whose employees Local 338 sought to represent. See note 4 supra and accompanying text. Whether or not Lawrence Overton and Hulan Jack knew of the precise methods chosen by Joseph Overton to secure the cooperation of given employers, they are responsible as conspirators, for acts taken by a co-conspirator to further the purposes of their agreement, see, e.g., *Pinkerton* v. *United States*, 328 U.S. 640, 647 (1946); evidence of such methods is surely relevant even as to unknowing co-conspirators. Moreover, any assertion that proof of Joseph Overton's coercive threats was properly excludible as beyond the scope of the indictment is legally unsound. Cf. *Korholz* v. *United States*, 296 F.2d 897, 901 (10th Cir. 1959), cert. denied, 361 U.S. 929 (1960); *United States* v. *McMaster*, 343 F.2d 176, 181 (6th Cir.), cert. denied, 383 U.S. 818 (1965). Such an assertion is factually erroneous as well—the indictment specified as an overt act a meeting between Joseph Overton and Cora Walker, a founder of the Co-op. Finally, there is the claim that the

[5] Certiorari was granted in part on an issue not relevant here.

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evidence was "prejudicial." Of course it was, in the sense that it helped the Government's case. But we have already held the evidence admissible; appellants argue that it should have been excluded because overtones of other crimes or sympathy for the Co-op might arouse hostility toward them. Whether such a ruling would have been correct on this record is doubtful; from appellants' point of view, at best this was a matter for the judge's discretion. In other rulings, the judge did not hesitate to exercise his power and protect defendants' rights when he thought appropriate.[6] His failure to exclude this evidence must have reflected a judgment—which we share—that its admission could not fairly be regarded as denying defendants a fair trial.

V

Appellant Jack requested that Judge Ryan charge the jury on the element of wilfulness as follows:

> The term "wilfully violates" in section 186(d) contemplates proof of an awareness of the restrictions of that section or a reckless disregard for that section.

The requested charge is squarely based on language in *United States* v. *Incisco,* 292 F.2d 374, 380 (7th Cir. 1961). Without regard to whether *Incisco* may have been subsequently modified by the Seventh Circuit itself, see *United States* v. *Keegan,* 331 F.2d 257, 261-62 (7th Cir.), cert. denied, 379 U.S. 828 (1964), the requested charge was properly rejected. In *United States* v. *Ricciardi,* 357 F.2d 91, 100 (2d Cir.), cert. denied, 384 U.S. 942 (1966), an

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[6] Judge Ryan severed trial on two counts which charged Hulan Jack and Joseph Overton with perjury on the ground that it would deprive defendants Rosenblum and Solomon of a fair trial. Further, the judge refused to allow the United States to prove these false statements as circumstantial evidence of guilty consciousness.

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appellant called attention to *Incisco*[7] and made precisely the same argument urged here. Nonetheless, we affirmed the lower court's refusal to give a charge substantially identical to the one requested by Jack; we reaffirm the validity of *Ricciardi*.

Appellant L. Joseph Overton raises several further claims. He argues that the trial judge erroneously denied his request for a nonjury trial; that empanelling an alternate juror after he had been placed in jeopardy was improper; and that the delay between indictment and trial exceeded what is permissible under our Rules Regarding Prompt Disposition of Criminal Cases. We have carefully considered these claims but have concluded that no reversible error was committed.

Judgments affirmed.

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[7] Brief for Appellant Unger 39-40.

In the Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-977

HULAN E. JACK, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-978

L. JOSEPH OVERTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.[1] A7-A18) is not yet reported.

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[1] "Pet. App." throughout this brief refers to the appendices to the *Jack* petition in No. 72-977.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1972. The petitions for writs of certiorari were filed on January 11, 1973 (Pet. App. A6). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner Jack:

1. Whether the trial court properly instructed the jury on the issue of willfulness.

Petitioner Overton:

2. Whether the trial court properly denied petitioner's request for a trial by the court.

3. Whether petitioner was placed in double jeopardy by the selection of an additional alternate juror.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners Overton and Jack were convicted of having violated provisions of the Taft-Hartley Act, 29 U.S.C. 186, and of having conspired to commit the substantive offenses, in violation of 18 U.S.C. 371. Petitioner Overton was sentenced to a one-year term of imprisonment, with execution of six months suspended, to be followed by a three year period of probation, and fined $10,000. Petitioner Jack was sentenced to one year imprisonment, with all but three months suspended, to be followed by three years' probation, and fined $5,000. The court of appeals affirmed (Pet. App. A6).

The evidence, the sufficiency of which is not in dispute, is set forth in detail in the opinion of the court below. Briefly, it showed that petitioners were part of a conspir-

acy which operated from January 1966 until late 1970. The purpose of the conspiracy was to exploit the influence which petitioner Overton, in his capacity as business agent for Harlem Local 338, AFL-CIO, exercised over retail grocers who employed members of that local. Petitioners, together with codefendants Rosenblum and Solomon, formed Coordinated Community Services, Inc. (CCS), a corporation which entered into contracts with various food manufacturers to promote their products in those grocery stores and supermarkets which employed or might employ members of Local 338. Retail merchants whose employees were represented by Local 338 were informed that they could expect labor difficulties if they were unwilling to purchase the products of CCS clients. By means ranging from mere solicitation to use of an illegal strike called by petitioner Overton himself, CCS was able to persuade the retailers to purchase from its clients; in return, CCS was paid substantial commissions by the manufacturers it represented.

ARGUMENT

1. Petitioner Jack contends that the trial court erred in refusing to charge the jury that the phrase "willfully violates" in 29 U.S.C. 186(d) "contemplates proof of an awareness of the restrictions of that section or a reckless disregard for that section." We submit that the court properly instructed the jury that "[a] general intent to commit the act charged need only be proved * * *. * * * [I]gnorance of the law forbidding an alleged unlawful act * * * is no defense * * *" (Tr. 1340-1341).[2]

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[2] The complete charge on this issue was as follows:

> A general intent to commit the act charged need only be proved. The government must prove only that the defendant whose guilt or innocence you are considering knowingly did the

Although, as petitioner notes, certain *malum prohibitum* offenses require specific intent to evade a legal obligation, the misdemeanor statute involved here is not within that exception. *United States* v. *Lanni*, 466 F. 2d 1102, 1110 (C.A. 3); *United States* v. *Ricciardi*, 357 F. 2d 91, 100 (C.A. 2), certiorari denied, 384 U.S. 942; *United States* v. *Carter*, 311 F. 2d 934 (C.A. 6), certiorari denied *sub nom. Felice* v. *United States*, 373 U.S. 915; *Brennan* v. *United States*, 240 F. 2d 253 (C.A. 8), certiorari denied, 353 U.S. 931. Any contrary suggestion in the language of the decision of the Seventh Circuit in *United States* v. *Incisco*, 292 F. 2d 374, has been disapproved by the later holding of that court in *United States* v. *Keegan*, 331 F. 2d 257, 262, certiorari denied, 379 U.S. 828.[3]

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act which the law forbids, but it need not be shown that the defendant whose guilt or innocence you are then considering knew of or purposely intended to violate the law.

A defendant's intent to conspire as charged may be determined from all the facts and circumstances surrounding the case. However, ignorance of the law forbidding an alleged unlawful act, even if it be a fact, is no defense either to the charge of conspiracy here made, which is Count 1, or to the charge as contained in Counts 4 through 21.

An act or failure to act is only done within the meaning of the statute here if it is done voluntarily and intentionally and not because of mistake or accident.

[3] *United States* v. *Fischetti*, 450 F. 2d 34 (C.A. 5), certiorari denied, 405 U.S. 1016, upon which petitioner also relies, is not in conflict with the decision below. The court in *Fischetti* merely held that since willfulness is an element of the offense it must be alleged in the indictment. The court there expressed no view concerning the appropriate standard of willfulness. The Tenth Circuit, as petitioner points out, in *Korholz* v. *United States*, 269 F. 2d 897, certiorari denied, 361 U.S. 929, termed as "accurate" an instruction which required the jury to find either specific intent to violate Section 186 or reckless disregard for the law, but the court did so in the course of affirming a conviction under that more stringent test. Since the

2. Petitioner Overton claims that the district court committed reversible error in denying his request for a non-jury trial. He argues that the prosecution should not have been permitted, without an appropriate showing of good faith, to withdraw its earlier oral consent to a jury-waived trial.

At a pretrial conference for the purpose of fixing a date certain for trial on November 5, 1971, defendants indicated for the first time their willingness to proceed without a jury. The defendants gave no reason for wanting to forego jury trial other than to expedite matters. After the court indicated that government consent was required to effectuate the defense's waiver of a jury trial, the prosecutor stated that the government was prepared to accept a waiver. At this point, the court stated that the waiver would not go into effect until each defendant had been advised of his right to a jury trial and all the parties had submitted their consent in writing.

When the parties reconvened on the following day, the prosecution stated that it had reexamined its position and decided not to consent to defendants' waiver of jury trial. The defendants did not object, but urged the court to inquire into the reasons underlying the government's decision. The court declined, noting that neither the defendants nor the prosecution had yet executed the written consent necessary to an effective waiver. This ruling was proper.

It is well settled that a defendant has no absolute right to be tried by a judge alone. *Singer* v. *United States*,

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instruction approved there was favorable to the defendant, the court was not required to focus closely on the appropriate willfulness standard.

380 U.S. 24. Rule 23, Fed. R. Crim. P., unequivocally conditions a non-jury trial upon the consent of the prosecution and further states that a waiver must receive the full sanction of the trial court before it becomes effective. This is in accordance with this Court's decision in *Patton* v. *United States*, 281 U.S. 276, 312. Here, as noted by the district court, no written waiver had been executed and the government was not required to "articulate its reasons for demanding a jury trial." *Singer* v. *United States*, *supra*, 380 U.S. at 37. See, also, *United States* v. *Simon*, 425 F. 2d 796, 799 n. 1 (C.A. 2), certiorari denied, 397 U.S. 1006.

3. Petitioner Overton also argues that the trial court erred in empanelling an alternate juror after petitioner had been placed in jeopardy. However, a review of the relevant facts shows that this claim is without merit.

On April 6, 1972, twelve jurors and two alternates were selected and sworn. The following day, one of the jurors was excused with the consent of all parties and an alternate replaced her. The trial judge then summoned a new panel of six veniremen and a new alternate was selected. The defendants were given three additional peremptory challenges, which could be directed at any of the twelve regular jurors or either of the two alternates. All defendants declined to exercise these peremptory challenges and the court withdrew the additional challenges which had been given to to the government. The trial proceeded to verdict without further change in the jury composition and, prior to deliberations, the two alternates were dismissed. Since the challenged alternate never participated in the jury's deliberations no further review of petitioner's technical claim is warranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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